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Chairman: Mr. Kawamura (Vice-Chairman) ..... (Japan)

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The meeting was called to order at 3.20 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Lavalle** (Guatemala) said that, owing to both its theoretical and practical importance, the question of the jurisdictional immunities of States and their property had always been one of the most fiercely debated topics in international public law. While it had lost some of its significance with the end of the cold war, it should still be codified as had been diplomatic and consular relations and special missions, to which it was closely related. The absence of codification meant that the subject had been dealt with piecemeal in the domestic legislation of States and under customary law; the precise details of such provisions were not generally known, however, and that created a particular disadvantage for small countries, especially developing countries, which did not have the relevant legislation or jurisprudence.

2. For that reason, his delegation was grateful for the progress made by the International Law Commission's Working Group on that topic and for the excellent proposals it had put forward. He specifically commended the revised version of draft article 2, paragraph 1 (b), which appeared in paragraph 30 of the Working Group's report (A/54/10, annex). He had, however, some reservations about the phrase in square brackets in paragraph 2.1 (b) (ii) of that article, which raised the problem of the burden of proof. The problem might be rectified by indicating where necessary in the draft articles that, unless there was proof to the contrary, States were assumed for the purposes of draft article 2 to have acted in the exercise of their lawful powers.

3. His delegation also had reservations about the Working Group's suggestion that the difficult problem of choosing between the nature test and the purpose test in determining whether a contract or transaction was a commercial one should be settled either by deleting draft article 2.2, or by adopting the approach taken by the Institut de Droit International in its 1991 recommendations. In the latter instance, while the note by the Institut appended to the Working Group's report did mention commercial contracts, it was hard to see how national courts could base their judgements on a mere recommendation, particularly one coming from a private institution. The best wording was that suggested in footnote 42 of the Working Group's report, with just one amendment: in the last sentence "may" should be replaced by "shall" and a phrase should be added stating that the other party to the contract must be aware of the nature of the contract or transaction in question.

4. He could not see the point of the suggestion made in paragraph 80 of the Working Group's report, given that article 10, paragraph 3, which it would change, related to cases where the State enjoyed immunity from jurisdiction, whereas the suggested text related to just the opposite. In his view, it would be better to replace the paragraph in question with the text contained in footnote 74 of the Working Group's report; it should also be moved from Part III, where it did not belong, and incorporated in draft article 5.

5. With regard to contracts of employment, his delegation endorsed the proposals contained in paragraphs 105 and 106 of the Working Group's report. He did not, however, understand why in article 11, paragraph 2 (b), the Spanish and French versions contained the words "*candidato*" and "*candidat*" respectively rather than equivalents of the word "person", used in the English text. Lastly, in paragraphs 127 and 128, the bracketed word "only" should be deleted. In paragraph 129, he found alternative 1 to be the most persuasive.

6. **Mr. Chaturvedi** (India) said that the draft articles on the nationality of natural persons in relation to the succession of States were guided by several important principles: that nationality was essentially governed by internal law within the limits set by international law; that the implementation of the articles should be sensitive to the legitimate interests both of States and of individuals; that every person, including children, had the right to a nationality; and that, in matters of succession, statelessness should be avoided and, as far as possible, reduced. Part Two considered the specific categories of succession of States to which those principles could be applied. Article 3 provided an important clarification, namely that the draft articles applied only to cases of succession which were in conformity with international law and the Charter of the United Nations. The occupation of territory by force or any other exchange or separation of territories without the consent of third States was therefore outside the scope of the draft articles.

7. The presumption of nationality, covered in article 5, played an important role in the draft articles, which also stressed the right of option in article 11 to choose between the nationality of the predecessor or the successor State. Article 10 stated the obvious principle of loss of nationality in the case of voluntary acquisition of the nationality of another State. In that regard, the draft articles trod a delicate path, neither endorsing nor denouncing the right of States to grant or recognize dual or multiple nationalities. States

were also required to take measures to facilitate the unity of the family in cases where it might be affected by acquisition or loss of nationality under the law.

8. Part Two was generally satisfactory in adapting the implications of general principles to each of the categories of succession. It also provided, in the absence of entitlement to any other nationality, for acquisition of the nationality of the successor State in cases where a person had his or her habitual residence in a third State at the time of succession or had been born in or had any other appropriate connection with the territory of the successor State. In such cases, the emphasis was on the last habitual residence as a criterion, although not to the exclusion of other criteria, provided that they met the general obligation of non-discrimination imposed by article 15.

9. The draft articles would have a very useful role to play in guiding States in establishing State legislation on nationality, which was a requirement under draft article 6. Their status, however, was essentially one of guidelines, for they honoured the primacy of domestic law so long as the principles of non-discrimination, right of nationality and right of option were duly recognized, as required by international law.

10. His delegation endorsed the Commission's recommendations that the draft articles should be adopted by the General Assembly in the form of a declaration, which would give States the necessary flexibility in applying the principles contained therein and would avoid the long delay in entry into force that would arise if the text took the form of a convention.

11. Lastly, concerning chapter VII of the Commission's report, he commended the Commission for its efficiency in considering the issues outstanding: the concept of the State for purposes of immunity; the criteria for determining the commercial character of a contract or transaction; the concept of a State enterprise or other entity in relation to commercial transactions; contracts of employment; and measures of constraint against State property. His delegation had noted the useful suggestions made by the Commission and was confident that the Working Group, which was to meet shortly, would be able to achieve consensus on the basis of those proposals, thereby paving the way for the adoption of draft articles in a suitable and generally acceptable form.

12. **Mr. Blumenthal** (Australia) said that the Commission's Working Group was to be commended for the progress that had been made on certain contentious issues concerning jurisdictional immunities of States and their property. His delegation would not object to the Working Group's recommendation that paragraph 2 of article 1, concerning the criteria for determining the commercial character of a contract or transaction, should be deleted. In view of the different criteria apparently applied in different States, it would be necessary for the parties to a commercial transaction to come to an understanding in advance of the criteria. Since debate on the issue had never failed to elicit strongly expressed views, it was doubtful that a solution acceptable to all could be found on that point, a consideration to be borne in mind when contemplating whether to hold a diplomatic conference on the draft articles.

13. His delegation had some concerns about the proposals relating to State enterprises engaged in commercial transactions. First, there appeared to be some difference of interpretation between the text of article 10, paragraph 3, and the commentary in the Working Group's report. Although agreeing with the Working Group that State immunity should not apply in the circumstances indicated, his delegation felt that the principle set out in paragraph 3 had a broader meaning, namely, that the immunity of the State should not be affected by the transactions or activities of legally separate State enterprises. As it had indicated on previous occasions, his delegation felt that the principle should be applied more generally and not limited to commercial transactions, and should therefore appear in Part II of the draft.

14. With regard to measures of constraint and, in particular, to the various alternatives proposed by the Working Group, namely the deletion of those provisions or the introduction of a grace period, his delegation had always been of the view that immunity from execution should not be so extensive as to reintroduce the rule of absolute immunity. It would support the deletion of the existing provisions, which would have the effect of making execution of a judgement possible when a State was subject to the jurisdiction of the Court that had rendered it, but such a solution might be too sweeping to be accepted by all States. In that case, it could support alternative I, as contained in the Working Group's report. However, his delegation did not agree with the list of categories of excluded property contained in article 19, since it believed that property excluded from execution should be limited to government non-commercial property. Lastly, the suggestion put forward by the representative of the United Kingdom concerning the elaboration of a model law merited serious consideration. Australia would support the Commission's continuing work on that important topic.

15. On the question of nationality in relation to the succession of States (chapter IV) the Commission was to be congratulated on completing the draft articles on the

nationality of natural persons, on the excellent work accomplished and on the contribution it had made to the codification and progressive development of international law. His delegation supported the Commission's recommendation that the General Assembly should adopt the draft articles in the form of a declaration which would be of immediate practical benefit to States in the situations covered by the articles and would not preclude the possibility of elaborating a legally binding instrument at a later stage. A declaration would help to reduce or eliminate statelessness and would thus promote and protect the fundamental right of every individual to a nationality. In view of the political transitions taking place in so many parts of the world, including Australia's own region, the Commission's contribution was not only important but timely.

16. **Mr. Manongi** (United Republic of Tanzania) said that he had read with interest the report of the Commission's Working Group on Jurisdictional Immunities of States and their Property. Since the topic was of interest to all States, the codification of international law in that area demanded an evaluation not only of the legal principles and existing State practice but also of the interests of the international community as a whole. If there was to be a convention on State immunity, it would have to attract the support of the majority of States.

17. The provisions of article 2 were an important step in the right direction, and it was thus regrettable that the Commission had proposed eliminating portions of them. The controversy centring on the criteria for determining the commercial character of a contract or transaction could not be resolved simply by eliminating the provisions of the draft articles relating to the issue. A new decision to that effect would not be neutral, but would only perpetuate the status quo. The draft articles could not be silent on the issue of the criteria to be applied, since that was the crux of the debate. While not perfect, article 2 afforded a good basis for negotiation in that it sought to strike a fair balance between the nature and purpose tests and reflected variations in State practice. To refuse to allow the purpose test to be applied in addition to the nature test in some cases was to impose a practice far from enjoying broad recognition even among the members of the Sixth Committee.

18. It was unfortunate that the Commission, seeing no possibility for consensus, had been reduced to recommending the approach taken by the Institut de Droit International. The evolution of the concept of State immunity had been largely determined by a variety of national and regional instruments, which had restricted State immunity by stipulating several exceptions and had been chiefly invoked before the courts of the countries an regions in which almost all actions against foreign States ha been brought. If the process of codification was n supported by the Commission, it might take a long time t develop. It would also be disappointing if the Commissio did not seize the opportunity to take an approach th accommodated different points of view and divergen interests resulting from inequalities of development an differences in economic and political regimes.

19. With regard to article 11, concerning contracts o employment, his delegation felt that the distinction betwee acts *jure imperii* and acts *jure gestionis* could be valuabl However, the distinction between sovereign and commercia acts was more complex in relation to employment, for tw reasons. The first had to do with the context or the nature o the location of an embassy or diplomatic mission, which w viewed as an extension of the territory of the foreign Stat The second had to do with the subjective nature of th criteria to be applied in defending the position of a employee in an immunity case. The latter point was al relevant to the reworked version of paragraph 2 (a). It wou be helpful to create a distinction based on the employee place of work.

The meeting rose at 3.55 p.m.